

**Editor's note: Reconsideration denied by Order dated March 8, 1989**

MR. AND MRS. WILLIAM J. HAMILTON

IBLA 87-261

Decided October 28, 1988

Appeal from a decision of the Deputy Director, Operations and Technical Services, Office of Surface Mining Reclamation and Enforcement, ruling that blasting in connection with a surface coal mine operation was not the cause of property damage as alleged in a citizen's complaint. Ten-day Notice No. 85-07-254-015.

Set aside, referred for hearing.

- I. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Blasting and Use of Explosives: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State

When OSMRE issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1271(a)(1) (1982), in response to a citizen's complaint alleging damage to a dwelling caused by blasting operations, this Board will set aside OSMRE's decision affirming the finding of the state regulatory authority that blasting operations did not cause the property damage and refer the case for a hearing before an Administrative Law Judge pursuant to 43 CFR 4.1286 where there are material issues of fact as to whether the blasting operations were a causative factor in the damage.

APPEARANCES: Mr. and Mrs. William J. Hamilton, East Canton, Ohio, pro sese; Susan K. Hoven, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Mr. and Mrs. William J. Hamilton (the Hamiltons) have appealed from a determination by the Deputy Director, Operations and Technical Services, Office of Surface Mining Reclamation and Enforcement (OSMRE), holding that

damage to the Hamiltons' dwelling was not caused by blasting on a nearby surface mine operated by Keffler and Rose Enterprises, Inc. (K&R), as alleged in the Hamiltons' complaint.

The case arose when the Hamiltons, on June 12, 1985, wrote Congressman Ralph Regula, alleging that blasting by K&R was causing damage to homes in East Canton, Ohio. On July 23, 1985, the complaint was forwarded to OSMRE's field office in Columbus, Ohio. OSMRE notified the Hamiltons on July 24, 1985, that a 10-day notice would be sent to the Ohio Division of Reclamation (DOR), the State regulatory authority, for investigation. <sup>1/</sup>

DOR filed its response to the 10-day notice with OSMRE on August 8, 1985. In this response, DOR stated that "[b]last vibrations were monitored almost continuously at homes closer to the blasting than Hamilton and Bellamy, from 12/7/83 to 8/28/84. No ground vibration levels exceeded our limit of 1.0 inch/sec. peak particle velocity." DOR concluded, citing its seismograph data, review of blast records, and its knowledge of the distance between the blast area and the Hamiltons' home, that K&R "has conducted blasting in a manner to prevent property damage from ground vibration and airblast." <sup>2/</sup>

At DOR's request, Milan Spanovich, a physical engineer with Engineering Mechanics, Inc., Pittsburgh, Pennsylvania, inspected the Hamiltons' home on August 30, 1985. By letter dated September 5, 1985, Spanovich set forth his "findings and conclusions regarding causation and extent of the claimed distressed areas" (Spanovich Letter to DOR at 1). He examined exterior masonry cracks in the property, but disagreed with the Hamiltons that the cracks resulted from blasting. In Spanovich's opinion, damage to the Hamiltons' home was caused by "three common forms of distress, none of which is related to blasting: thermal shrinkage stresses; lintel heave from rust expansion; and excessive temperature stresses to which the top of the chimney has been subjected." Id. at 3. <sup>3/</sup> He concluded that "none of the claimed distresses to the Hamilton dwelling were caused by vibrations from blasting. They are, in fact, common inherent deficiencies in residential construction." Id. at 4.

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<sup>1/</sup> OSMRE issues 10-day notices pursuant to section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), which provides in part:

"Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists."

<sup>2/</sup> File, tab 6.

<sup>3/</sup> File, tab 11. Spanovich's report dated Sept. 5, 1985, states in part:

"Although the masonry components of the structures - brickwork, stonework, and concrete - are strong in compression and can sustain substantial compressive stresses from expansion during warm temperatures, they are weak

By memorandum dated August 20, 1985, the Director, Columbus Field Office, OSMRE, requested that OSMRE's Eastern Technical Center (ETC) review the adequacy of the technical procedures utilized by DOR in responding to the 10-day notice. In its response dated September 20, 1985, the ETC concurred in DOR's handling of the 10-day notice, even though no information was provided on possible underground mines in the area, no maps were included showing the location of the Hamiltons' residence relative to the vibration source and the seismograph sites, and ETC noted that certain conditions, either man made or geologic, could modify normal vibrations even though blasts were conducted within the regulatory limits. After reviewing the Spanovich letter, ETC in a follow-up memorandum of October 9, 1985, stated: "The conclusion that the damage to the dwellings is not attributable to blasting appears to be based on a reasoned evaluation of conditions that result from several causes of stress to structures and construction materials." By letter dated November 15, 1985, the Columbus Field Office, OSMRE, informed the Hamiltons that "the DOR procedures were a technically sound approach to determining the causes of damage," and that OSMRE would be taking no further action on their complaint.

On February 5, 1986, the Hamiltons sought review of the Columbus Field Office's decision by the Director, OSMRE. The complaint was re-evaluated and another site inspection was conducted by OSMRE civil engineer, Jonathan D. Ventura, who summarized his findings and conclusions as follows:

The damage to the Hamilton residence could not be related to surface blasting on the Keffler and Rose Enterprise, Inc.'s nearby surface mine, Permit D-105. All available records would support that, at the Hamilton residence, ground vibrations and sound levels from blasting on Permit D-105 would have been below program requirements which are established to prevent the structural damage alleged to have occurred. The investigation conducted by Milan Spanovich of Engineering Mechanics, Inc. thoroughly documents the damage and presents a technically sound scenario of the causes of cracks and distresses to the Hamilton house. [4/]

By letter-decisions dated June 24 and December 1, 1986, OSMRE's Deputy Director of Operations and Technical Support informed the Hamiltons that further Federal action on their complaint was unwarranted, based upon the

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fn. 3 (continued)

in tension and cannot sustain tensile stresses from contraction (shrinkage) during cold temperatures. At this latitude, where ambient temperature differentials alone exceed 100~F, it is necessary to use construction displacements. As no such joints were provided in the exposed masonry components of the porch and double garage, they created their own 'construction joints' by separating at inherently weak areas. Such areas exist between the first floor and basement window of the porch left wall; above the porch front entrance; and about other doorway and window discontinuities."

4/ File, tab 25.

findings of ETC that damages to their residence were unrelated to K&R's blasting operations. 5/

In their appeal letter dated December 9, 1986, the Hamiltons allege that the reports of engineers Spanovich and Ventura are unfounded and untruthful. They maintain that the damage to their home was caused by blasting on K&R's surface mine, alleging that a blast at approximately 2 p.m. on February 2, 1984, caused "most of the damages." The Hamiltons advance the following arguments in their letter:

I [Mr. Hamilton] called [the] Keffler and Rose office in Minerva, Ohio, and they confirmed the blasting. Mr. Dean Rose \* \* \* came to view the damages in June, 1984. And Mr. Dean Rose wanted to set a seismograph in this area, after the damage was done. Then Keffler and Rose had two geotechnical engineers come to our home to make a report. Both of these gentlemen were from the same engineering office (Engineering Mechanics, Inc.). Both of these gentlemen were very bias minded towards Keffler and Rose and the State of Ohio.

OSMRE states in its answer that K&R records indicate that no blasting occurred on February 2, 1984, and that an automatic seismograph maintained by DOR was not triggered in the period January 31 to February 8, 1984 (Answer at 7). OSMRE argues that the documents in the file show there is no evidence to link the Hamiltons' damage to the blasting by K&R. 6/

[1] Under section 515(b)(15) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1265(b)(15) (1982), general performance standards applicable to all surface coal mining operations shall require an operation, as a minimum, to insure that explosives are used only in accordance with existing state and Federal law and the regulations promulgated by the regulatory authority. These regulations must include provisions to "limit the type of explosives and detonating equipment, the size, the timing and frequency of blasts based upon the physical conditions of the site so as to prevent \* \* \* (ii) damage to public and private property outside the permit area." Section 515(b)(15) of SMCRA, 30 U.S.C. | 1265(b)(15)(C) (1982). Accordingly, 30 CFR 816.67(a) provides as a general requirement that "[b]lasting shall be conducted to prevent \* \* \* damage to public or private property outside the permit area."

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5/ Because its first decision provided incorrect appeal information, OSMRE issued an amended decision on Dec. 1, 1986. Unfortunately, the second decision again incorrectly advised the Hamiltons with respect to appeal procedures. The resulting irregularities were addressed in a Board order dated Feb. 19, 1986, and do not bear on the disposition of the appeal.

6/ The Ventura report states that K&R had no record of any blast being detonated on Feb. 2, 1984. Blasts were, however, set off on Feb. 1 and 3. According to the report, these blasts did not trigger a seismograph maintained by DOR at a private residence 5,300 feet from the north edge of the permit area. According to the Spanovich report, the Hamilton residence is

Clifford Mackey, 99 IBLA 285 (1987), involved citizens' complaints in which the complainants alleged damage to their homes as the result of blasting activities by a surface coal mine operator. In its decisions, issued in response to the citizens' complaints, OSMRE concluded that no damage to the homes was caused by blasting, and that OSMRE would take no further action in those cases. This Board, in applying section 515(b)(15) of SMCRA, 30 U.S.C. § 1265(b)(15) (1982), and 30 CFR 816.67(a), stated that its responsibility in such cases "is to review OSMRE's determinations, based upon its inspections of appellants' dwellings, that no violations of the general performance standard to conduct blasting so as to prevent damage to public or private property outside the permit area had occurred." 99 IBLA at 289. In the Board's opinion, "[c]ritical to resolution of the issue raised by this appeal is the question of whether the blasting was a causative factor in the damage to the dwellings." Id. Based upon the record, the Board concluded in Mackey that causation was a question of material fact which should be resolved through an evidentiary hearing before an Administrative Law Judge. The Board observed that "[w]hile it is not the province of this Department to ascertain liability of the operator for damages to the dwellings at issue, the obligation to determine whether blasting by the operator is causing damage to property off the permit in violation of the Act cannot be ignored." Id. at 290.

Hamilton presents a scenario different from that set forth by Spanovich and Ventura that may be equally valid. He states that he has "been in the construction business for better than 50 years, as a brickman, and supervisor" (Letter dated Dec. 9, 1986), and that "bricklaying, stone-work and concrete work is [his] specialty" (Letter dated Jan. 18, 1986). Given his assertions, we are not inclined to reject the possibility of his position.

Hamilton challenges the conclusion of Spanovich and Ventura that "shrinkage and stress caused the damage." Instead, he insists that "[t]he cause was air blast and ground vibrations to all the homes in this area." <sup>7</sup>/ He disputes the conclusion reached by Spanovich and Ventura that the chimney damage was caused by excessive heat. According to the general manager of a

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fn. 6 (continued)

approximately 4,000 feet north of the permit area. The Ventura report states in part:

"If any blast was initiated on the north edge of the permit during the period January 31, 1984, to February 8, 1984, (including February 2, 1984) it would not have resulted in ground vibration in excess of 0.2 inches per second at the Hamilton residence, that is, any larger blasts would have triggered the seismograph. This size blast would also not result in sound levels in excess of program requirements. This size blast could have been sensed and heard at the Hamilton house; but, based on the results published from past research, would not have resulted in structural damage to the Hamilton residence, i.e. cracked concrete slabs, cracked bricks, cracked stone, etc."

<sup>7</sup>/ The Hamiltons supported their appeal letter with additional letters written by Francis and Jack Bryan and by Ruth and Robert Dickinson, who

clay company, who Hamilton visited, when subjected to excessive heat a chimney "will crack vertically, not horizontally or radical as shown in the photo." Id. Hamilton states that he installed the concrete slab in 1975, and asserts that the materials and techniques used would have prevented damage from shrinkage. Id.

Hamilton is certain that the blast which caused most of the damage to his home took place on February 2, 1984. He asserts that he called K&R's office in Minerva, Ohio, and received confirmation on February 3, 1984, that K&R had set off the blast (Letter dated Jan. 18, 1986). While K&R's records inspected by Ventura show that blasts were conducted on February 1 and 3, 1984, but not on February 2, 1984, Hamilton provides sufficient detail about the event to present an issue of fact as to whether a blast actually took place on February 2, 1984.

As in Mackey, we conclude that the instant case presents a question of fact as to whether the blasting was a causative factor in damage to the Hamiltons' dwelling.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge. The decision of the Administrative Law Judge shall be final for the Department in the absence of a timely appeal by a party adversely affected.

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Gail M. Frazier  
Administrative Judge

I concur:

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Kathryn A. Lynn  
Administrative Judge  
Alternate Member

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fn. 7 (continued)

also allege that K&R's blasting operations caused damage to their homes. The Bryans assert that "the blasting has cracked [their] basement walls and [their] garage floor and garage walls," that the value of their house has dropped by about \$15,000, and that their "ability to sell is zero." Similarly, the Dickinsons contend that they had to replace windows because the blasting broke all seals, caused cracks in walls, footers, cement walk ways, and chimney, and moreover, that K&R's operations destroyed their water supply.